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No. 772

In the Supreme Court of the United States

OCTOBER TERM, 1954

HERBERT LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 772

BRUTUS LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2; R. 124) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on March 16, 1955 (R. 126) and a petition for rehearing was denied on April 6, 1955 (R. 125). The petition for a writ of certiorari was filed on May 6, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction for narcotics offenses.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

After having waived his right to trial by jury (R. 7), petitioner was found guilty under two counts which charged narcotics violations under 21 U.S.C. 174 (count 3) and 26 U.S.C. 2554(a) (count 2) (R. 3-4, 92). He was sentenced gener-

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ally to a term of imprisonment of three years and to pay a fine of $1,000 and the costs of prosecution (R. 98). On appeal, the judgment of conviction was affirmed (R. 126).

The evidence adduced in support of the verdict may be summarized as follows:

On December 12, 1952, about 8:30 or 9:00 P.M., special government employee Steve Lewis and federal narcotics agent Charles S. Montgomery visited petitioner, whom Steve Lewis knew, at the Graymont Hotel in Chicago (R. 10, 13, 15-29). Lewis asked petitioner if he was still working for Harry Chenault. Petitioner replied "Yes". (R. 16, 17, 29.) Lewis then introduced agent Montgomery as "Bill Ramsey" and informed petitioner that he and Ramsey were partners, were beginning to deal in narcotics and were interested in doing business with petitioner (R. 10, 17, 29, 30). Petitioner replied "that would be swell" (R. 30). Present in the room were two other men and two women, who were using narcotics (R. 10, 29). Petitioner asked Lewis and Montgomery how much "stuff" they wanted and was told 1/16th of an ounce (R. 17, 30).[1] Petitioner said "O.K.", stepped out into the hall, and asked Lewis to join him (R. 11, 18, 30). In the hall, petitioner asked Lewis if he knew the man who accompanied him to the hotel. Lewis replied that he was his brother. (R. 11, 19.) Thereupon petitioner told Lewis to return to the room

[1] Lewis testified that he told petitioner they wanted 1/16th of an ounce (R. 11) and Montgomery said that he did (R. 30, 36).

and petitioner would be right back (R. 11, 20). Lewis did so. Within a few minutes, petitioner handed a package to agent Montgomery, for which Montgomery gave him $17.50. (R. 20, 30.) Before leaving, Montgomery asked petitioner whether they would be able to contact him again. Petitioner said that they could contact him through the DuSable Lounge at 39th and Oakwood Boulevard. (R. 24, 30.) Upon analysis, the package which petitioner gave Montgomery was determined to contain heroin (R. 32). There were no tax stamps on the package and the transfer was not made pursuant to the required Treasury form (R. 12, 32).

Petitioner testified as follows:

After Montgomery and Steve Lewis entered his room, Steve Lewis asked Montgomery to go into the hall. While Montgomery was out of the room, Lewis asked petitioner if he were still "selling stuff". Petitioner said that he never sold any "stuff". Lewis said he heard that petitioner did, and that he wanted to buy some. Thereupon petitioner told him to "get on out". (R. 51.)

Petitioner said that at that time the only other persons in the room were two women, Geraldine and Alexine Dunmore, with whom he had been playing cards (R. 49, 51, 53). The women testified that when Montgomery and Lewis arrived, Montgomery left the room while petitioner and Lewis talked (R. 62-63, 71-72). In rebuttal, Montgomery and Lewis testified that Geraldine and Alexine

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Dunmore were not the two women who were in petitioner's room when they visited petitioner on December 13, 1952 (R. 79, 82).

ARGUMENT

The Statement, *supra*, pp. 2-5, clearly demonstrates the frivolousness of petitioner's general attack (Pet. 5) upon the sufficiency of the evidence to support his conviction. Equally frivolous are petitioner's additional specific challenges. His argument (Pet. 4-5) that the conviction under count 3 must fall because there was no evidence of scienter, receipt, concealment or buying as required by 21 U.S.C. 174 overlooks that portion of the statute which makes possession of a narcotic drug "sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury".

To argue as petitioner does (Pet. 6) against the verdict because of trivial inconsistencies in the testimony of government witnesses, and because the testimony of defense witnesses was not accepted, usurps the trial court's function. The judge stated, in arriving at his verdict, that (R. 92):

> Upon a consideration of all of the evidence and particularly with reference to the appearance and demeanor of the witnesses on the stand, the circumstances surrounding the witnesses at the time about which they are testifying, the position of the witnesses and the nature of their employment, I feel that the government has clearly proved its case beyond a

reasonable doubt as to the charges in Counts 2 and 3.

Petitioner contends (Pet. 5) that the judge should have found that there was entrapment. But neither in his argument before the trial court nor in the presentation of his evidence did petitioner raise this defense. Entrapment is a defense which must be raised and proven specifically by the defense. *Sorrells* v. *United States*, 287 U.S. 435, 452; *Claiborne* v. *United States*, 77 F. 2d 682, 691 (C.A. 8); *United States* v. *Pappagoda*, 288 Fed. 214 (D. Conn.). Such a defense admits the commission of the offense, whereas petitioner's sole defense at the trial was to the contrary, i.e., that he did not commit the acts in question.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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